

ISSUE DATE: March 12, 1997

DOCKET NO. P-442, 5321, 3167, 466, 421/CI-96-1540

NOTICE AND ORDER FOR HEARING

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey
Joel Jacobs
Marshall Johnson
Mac McCollar
Don Storm

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of a Generic Investigation of US
West Communications, Inc.'s Cost of
Providing Interconnection and Unbundled
Network Elements

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PROCEDURAL HISTORY

On December 2, 1996, the Commission issued its ORDER RESOLVING ARBITRATION ISSUES AND INITIATING A US WEST COST PROCEEDING in Docket Nos. P-442, 421/M96-855, P-5321, 421/M-96-909, and P-3167, 421/M96-729 (Consolidated Arbitration Order). In that Order the Commission established interim prices for interconnection and unbundled network elements in the territory served by US West Communications, Inc. (US West). The Commission also initiated the present proceeding to establish prices to replace the interim prices.

On December 13, 1996, the Commission invited interested persons to comment on this proceeding's scope, schedule and procedural treatment. The Commission received comments from AT&T Communications of the Midwest, Inc. (AT&T), Frontier Communications of Minnesota, Inc. (Frontier), MCImetro Access Transmission Services (MCImetro), MFS Intelenet, Inc. (MFS), the Minnesota Department of Public Service (the Department), the Minnesota Independent Coalition (MIC), the Minnesota Office of the Attorney General - Residential Utilities Division (OAG), Sprint/United Telephone Company of Minnesota and Sprint Telecommunications Company, L.P. (Sprint), and US West. The Commission received reply comments from AT&T, Enhanced Telemanagement, Inc. d/b/a Frontier Telemanagement Inc. and Frontier Local Service Inc. (FT), Frontier, MCImetro, MFS, the Department, OAG and US West.

On March 3, 1997, the Commission heard oral argument on this matter.

FINDINGS AND CONCLUSIONS

I. Jurisdiction

The Commission has jurisdiction over this proceeding pursuant to §§ 216A.05, 237.06 and 237.16 of Minnesota Statutes, and §§ 252 (b), (c) and (d) of the Federal Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.* (the Act).

II. Scope of Proceedings

A. Uncontested items

Various parties suggested that the docket establish the cost of the following items:

- unbundled network elements,
- unbundling,
- collocation,
- interconnection,
- access operational support systems,
- call completion services,
- directory assistance, and
- interim number portability.

No party objected to any item on this list. The Commission finds it reasonable to include an investigation of the cost of these items within the scope of this proceeding.

In oral argument, AT&T proposed adding items to this list, including--

- pole connections, rights-of-way, conduits and ducts, and
- permanent number portability.

Rather than address the merits of adding these items to the docket at this stage of the proceeding, the Commission will defer to the judgment of the Office of Administrative Hearings' Administrative Law Judge (ALJ), as discussed below, to determine what additional related issues to include within the docket.

B. Contested item--geographic and temporal deaveraging

Within US West's system, the cost of providing some elements of telephone service may vary from place to place -- especially between urban and rural places -- and from time to time -- especially between times of peak demand and times of low demand. Someone that calculates the cost for an element without addressing cost changes over geography and time effectively generates an average cost for that element. Someone that generates multiple costs for an element, reflecting changes in geography and time, effectively generates "deaveraged" costs. The parties disagree about whether the current proceeding should attempt to incorporate

deaveraging into the costing analysis.

As a matter of law, the FCC observed that the Act directs state commissions to establish prices based on cost, and construed this language to mandate geographically-deaveraged costs. FIRST REPORT AND ORDER, paragraphs 764-65; see also § 51.507.¹ As a matter of fact, some cost models purport to show that costs do indeed vary by geography.

On the other hand, the Act apparently limits the extent to which the Commission may geographically deaverage rates, regardless of cost:

[C]onsumers in all regions of the nation, including low-income consumers and those in rural, insular, and high-cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services that are reasonably comparable to those services provided in urban areas and that are available *at rates that are reasonably comparable to rates charged for similar services in urban areas.*

The Act at § 254(b)(3), emphasis added.

Some parties express concern that determining geographically-deaveraged costs will result in much higher costs being associated with providing rural services before mechanisms for subsidizing high-cost areas are in place. As a result, some parties have proposed considering geographic deaveraging in a separate docket, perhaps in conjunction with a consideration of subsidies for high-cost areas. The Department suggests establishing a separate, state-wide docket for determining a methodology for determining geographically deaveraged rates.

US West expressed concern that implementing temporal deaveraging would require measuring local service, could be burdensome.

The Commission will approve consideration of both geographic and temporal cost variations in the present proceeding. Failure to consider these matters would undermine the very purpose of this docket: the rigorous determination of US West's costs.

Concerns about the consequences of considering deaveraging are premature. The Commission will retain discretion in implementing any resulting changes. Regarding mechanisms for subsidizing services in high-cost areas, the FCC plans to issue new rules regarding subsidies for high-cost areas on May 8, 1997, before the anticipated conclusion of these proceedings. Additionally, the Commission intends to address this matter in Phase II of the Commission's local competition rulemaking, which will proceed concurrently with this docket. In any event, the Commission is reluctant to pass judgment on the consequences of deaveraged rates without first learning about the costs that would underlie those rates.

¹The Eighth Circuit has stayed the effect of this portion of the order. *Iowa Utilities Board v. FCC*, File No. 96-3321, Order Granting Stay Pending Judicial Review (October 15, 1996).

C. Contested item--US West's wholesale discount

Under the Act, a competitive local exchange company (CLEC) may provide service to its customers by interconnecting and using the facilities of the incumbent local exchange company (ILEC), such as US West. When a CLEC wants to do this, the Act directs the state commission to establish the rates the ILEC may charge the CLEC. The commission may set these wholesale rates by taking the amount of the ILEC's retail rate and deducting the amount of the ILEC's wholesale discount. The wholesale discount reflects the share of the ILEC's costs that it could avoid in providing service on a wholesale, rather than retail, basis.

In the Consolidated Arbitration Order, the Commission established US West's wholesale discount rate after finding that it had sufficient evidence to do so.

The record is sufficient to establish avoided costs on a permanent basis, based on the avoided costs studies.... [T]he Commission will adopt the avoided cost discount rate of 21.5 percent proposed by MCImetro for the AT&T/US West and MCImetro/US West contracts.

Consolidated Arbitration Order, p. 34 (December 2, 1996). US West would like the Commission to reconsider its decision about US West's wholesale discount in the context of this proceeding.

US West argues that the Commission based its decision on a methodology prescribed by FCC rules, and that the Eighth Circuit has stayed the effect of those rules. US West anticipates that the Eighth Circuit may issue its final decision on the FCC's rules during the pendency of this proceeding, and that the decision may affect the Commission's thinking on US West's wholesale discount rate.

The Commission will decline to include a reconsideration of US West's wholesale discount rate within this proceeding. The purpose of this proceeding is to provide a forum for matters that did not receive a full hearing on the record of the Consolidated Arbitration, and were therefore decided on an interim basis. There is no shortage of information on the appropriate discount rate for US West, and the Commission's decision on this point was emphatically permanent. Moreover, the Commission was well aware of the Eighth Circuit's stay at the time it determined US West's wholesale discount rate; US West's wholesale discount rate reflects the Commission's judgment, not the FCC's. When the Eighth Circuit renders its final decision in this matter, US West may take whatever actions it deems appropriate at that time.

III. Procedures and schedule the parties should follow in this docket

The Commission's staff proposed the following procedure, which it compiled from the positions of the parties:

- a. establish a contested case proceeding and refer the generic cost proceeding to the Office of Administrative Hearings for hearing before an ALJ;

- b. request the ALJ to file a report and recommendation with the Commission no later than October 31, 1997;
- c. direct all parties proposing a cost study or cost methodology to submit such studies or methodologies no later than March 31, 1997; and
- d. require that all filed cost studies include --
 - (1) the cost model software programs, including the application software, if necessary;
 - (2) a computer and an operating system at the party's location, if necessary;
 - (3) the input data used in the filed cost studies;
 - (4) a written explanation of assumptions, processes and calculations of the cost model, including the engineering model, if any, underlying the cost model;
 - (5) a manual explaining the use of the cost model programs;
 - (6) a demonstration that each model duplicates all of the cost model outputs included in the cost studies;
 - (7) a chart showing which cost elements are related to, or incorporated by, the process in the interconnection contracts between
 - AT&T Communications of the Midwest, Inc., and US West;
 - MCImetro Access Transmission Services, Inc. and US West;
 - MFS Intelenet, Inc., and US West; and
 - Sprint Communications Company L.P. and US West; and
 - (8) testimony supporting the cost study.

In addition, the staff proposed the following procedural schedule:

Proceedings before the Office of Administrative Hearings

March 14	ALJ convenes prehearing conference.
March 31	Parties submit proposed cost studies and supporting material.
June 30	Parties submit testimony regarding other parties' cost studies.
August 18	Parties submit rebuttal testimony.
August 25	Parties submit surrebuttal testimony.
September 8	ALJ convenes evidentiary hearings.
September 29	Parties file initial briefs.
September 13	Parties file reply briefs.

October 31 ALJ files report.

Proceedings before the Commission

November 10 Parties file exceptions to ALJ's report.

December 2 Parties begin oral arguments; Commission begins deliberations.

December 19 Commission issues Order.

While various parties opined that they could complete the tasks within the docket's scope more quickly, no party objected that the staff's proposal caused undue delay. To the contrary, the Department emphasized the ambitious nature of the schedule. The Department suggested that any party's delay in providing every element of its cost study supporting materials (presumably due March 31) should postpone the next testimony filing (presumably on June 30) by an equal period. US West argued in favor of having informal workshops in which the proponents of each costing model could present their models.

The Commission prefers the structure of a formal contested procedure for this docket. Therefore, the Commission will declare this proceeding a contested case, and will approve the procedures proposed by staff. The Commission will defer the question of whether to hold informal workshops to the ALJ.

Similarly, while the Commission finds the proposed schedule and the resulting comments reasonable, the Commission will defer to the ALJ to establish its procedural schedule except as otherwise specified.

IV. Burden of proof

AT&T, MCImetro, MFS and OAG advocate placing the burden of proof in this docket on US West. They argue that US West has possession of most of the data relevant to this docket. Placing the burden of US West would be fair, would promote the development of an adequate record, and would conform to the Commission's practice in the Consolidated Arbitration and the FCC's rules, 47 C.F.R. §§ 51.5, 51.321. AT&T argues that US West, in seeking to establish rates different from the rates approved in the Consolidated Arbitration, should bear the same burden that any party would bear when it seeks to alter Commission-approved rates.

Frontier and MIC argue that the proponent of any cost study should bear the burden of demonstrating the merits of that study.

US West argues that the "burden of proof" concept has little or no application in the present proceeding. The ALJ, and later the Commission, should evaluate the models and arguments marshaled by the parties on an equal basis. Parties alleging that US West invariably has superior access to relevant data fail to consider that at least one of the costing models, the Hatfield model, does not rely on US West-specific data, and is advocated -- and perhaps owned -- by AT&T and MCImetro. Placing the burden of proof on US West with respect to such a model would not promote the development of the record; rather, it would shield such model from effective scrutiny while placing US West at an inappropriate tactical disadvantage.

Because the Commission desires to obtain substantial evidence for the record of this proceeding to inform its decisions, the Commission will retain the concept of “burden of proof” in this docket. The Commission will place the burden of proof on US West, because US West has superior access to most of the relevant information. However, the Commission is sensitive to the potential for injustice in requiring US West to bear the burden of production on matters where another party has superior access to the relevant data. Therefore, if the ALJ concludes that another party has superior access to relevant information, the Commission will defer to the ALJ to shift the burden of production and require that party to produce evidence relevant to that issue.

V. Administrative Matters

A. Administrative Law Judge

The Administrative Law Judge assigned to this case is Steve M. Mihalchick. His address and telephone number are as follows: Office of Administrative Hearings, Suite 1700, 100 Washington Square, Minneapolis, Minnesota 55401-2138; (612) 349-2544.

B. Hearing Procedure

Hearings in this matter will be conducted in accordance with the Administrative Procedure Act, Minn. Stat. §§ 14.57-14.62; the rules of the Office of Administrative Hearings, Minn. Rules, parts 1400.5100 to 1400.8400; and, to the extent that they are not superseded by those rules, the Commission's Rules of Practice and Procedure, Minn. Rules, parts 7829.0100 to 7829.3200. Copies of these rules and statutes may be purchased from Minnesota's Bookstore, 117 University Avenue, St. Paul, Minnesota 55155, (800) 657-3757.

Under these rules formal parties may be represented by counsel, may appear on their own behalf, or may be represented by another person of their choice, unless otherwise prohibited as the unauthorized practice of law. They have the right to present evidence, conduct cross-examination, and make written and oral argument. Under Minn. Rules, part 1400.7000, they may obtain subpoenas to compel the attendance of witnesses and the production of documents.

Any person intending to appear at the hearing as a formal party must file a notice of appearance (Attachment A) with the Administrative Law Judge within 20 days of the date of this Order. Failure to appear at the hearing may result in facts and issues being resolved against the party who fails to appear.

Parties should bring to the hearing all documents, records, and witnesses necessary to support their positions. They should take note that any material introduced into evidence may become public data unless a party objects and requests relief under Minn. Stat. § 14.60, subd. 2.

Any questions regarding discovery under Minn. Rules, parts 1400.6700 to 1400.6800 or informal disposition under Minn. Rules, part 1400.5900 should be directed to Dennis Ahlers, Assistant Attorney General, Suite 350, 121 7th Place East, St. Paul, Minnesota 55101-2147, (612) 296-0410.

The time, date, and place of the evidentiary hearing will be set by order of the ALJ after consultation with the Commission and intervening parties.

C. Parties and Intervention

Current parties to this proceeding are AT&T, Frontier, FT, MCImetro, MFS, the Department, MIC, OAG, Sprint, and US West. Anyone else who wishes to become a formal party to this proceeding shall promptly file a petition to intervene with the Administrative Law Judge, and serve copies on all current parties and on the Commission. Minn. Rules, part 1400.6200.

D. Prehearing Conference

A prehearing conference will be held on Friday, March 14, 1997, at 9:00 a.m. in the Large Hearing Room, Public Utilities Commission, 121 7th Place East, Suite 350, St. Paul, Minnesota 55101-2147.

All parties and persons intending to intervene should attend the conference, prepared to discuss time frames, scheduling and any other matter left unresolved by this Order.

E. Application of Lobbying Provisions

The lobbying provisions of the Ethics in Government Act, Minn. Stat. §§ 10A.01 et seq., apply to rate setting proceedings. Persons appearing in this proceeding may be subject to registration, reporting, and other requirements set forth in that Act. All persons appearing in this case are urged to refer to the Act and to contact the Minnesota Ethical Practices Board, telephone number (612) 296-1720, with any questions.

F. Ex Parte Communications

Restrictions on ex parte communications with Commissioners and reporting requirements regarding such communications with Commission staff apply to this proceeding from the date of this Order. Those restrictions and reporting requirements are set forth at Minn. Rules, parts 7845.7000 to 7845.7600, which all parties are urged to consult.

ORDER

1. The scope of this proceeding shall include an investigation of the following costs:
 - unbundled network elements,
 - unbundling,
 - collocation,
 - interconnection,
 - access operational support systems,
 - call completion services,
 - directory assistance,
 - interim number portability,and additional related issues as determined by the ALJ.
2. The Commission includes geographic and temporal (peak and off-peak) deaveraging within the scope of this proceeding.
3. The Commission declines to reconsider US West's wholesale discount rate within the scope of this proceeding.
4. The Commission --
 - a. establishes a contested case proceeding and refers the generic cost proceeding to the Office of Administrative Hearings for hearing before an ALJ;
 - b. requests the ALJ to file a report and recommendation with the Commission no later than October 31, 1997;
 - c. directs all parties proposing a cost study or cost methodology to submit such studies or methodologies no later than March 31, 1997; and
 - d. requires that all filed cost studies include--
 - (1) the cost model software programs, including the application software, if necessary;
 - (2) a computer and an operating system at the party's location, if necessary;
 - (3) the input data used in the filed cost studies;
 - (4) a written explanation of assumptions, processes and calculations of the cost model, including the engineering model, if any, underlying the cost model;
 - (5) a manual explaining the use of the cost model programs;
 - (6) a demonstration that each model duplicates all of the cost model outputs included in the cost studies;
 - (7) a chart showing which cost elements are related to, or incorporated by, the process in the interconnection contracts between

- AT&T Communications of the Midwest, Inc., and US West;
 - MCImetro Access Transmission Services, Inc. and US West;
 - MFS Intelenet, Inc., and US West; and
 - Sprint Communications Company L.P. and US West; and
- (8) testimony supporting the cost study.
5. US West shall bear the burden of proof, except that if other parties possess the key information on a particular issue, the ALJ may shift the burden of production and require other parties rather than US West to go forward with the evidence on that point.
6. The contested case proceeding shall begin with a prehearing conference on Friday, March 14, 1997, at 9:00 a.m. in the Large Hearing Room, Public Utilities Commission, 121 7th Place East, Suite 350, St. Paul, Minnesota 55101-2147.
7. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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ATTACHMENT A

BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS

Suite 1700
100 Washington Square
Minneapolis, Minnesota 55401-2138

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

Suite 350
121 Seventh Place East
St. Paul, Minnesota 55101-2147

In the Matter of a Generic Investigation of US
West Communications, Inc.'s Cost of
Providing Interconnection and Unbundled
Network Elements

MPUC Docket No. P-442, 5321, 3167, 466,
421/CI-96-1540

OAH Docket No.

NOTICE OF APPEARANCE

Name and Telephone Number of Administrative Law Judge:

Steve M. Mihalchick
(612) 349-2544

TO THE ADMINISTRATIVE LAW JUDGE:

You are advised that the party named below will appear at the above hearing.

NAME OF PARTY:

ADDRESS:

TELEPHONE NUMBER:

PARTY'S ATTORNEY OR OTHER REPRESENTATIVE:

OFFICE ADDRESS:

TELEPHONE NUMBER:

SIGNATURE OF PARTY OR ATTORNEY: _____

DATE: _____